Tan Kong Min v Malaysian National Insurance Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–14 OF 2003(W)
ABDUL MALEK AHMAD PCA, SITI NORMA YAAKOB AND ALAUDDIN FCJJ
27 JULY 2005

Land Law — Charge — Enforcement of — Action by chargee to recover shortfall from a foreclosure proceeding — Whether recovery of balance owing must be brought concurrently with foreclosure proceedings — Whether action for balance owing founded on contract and subject to limitation period of six years — When cause of action accrue and limitation period began — Limitation Act 1957 ss 6 & 21

Limitation — Charge — Action by chargee to recover shortfall from a foreclosure proceeding — Whether founded on contract and subject to limitation period of six years — When cause of action accrue and limitation period began — Limitation Act 1957 ss 6 & 21

By way of security, the appellant, had in 1984 created a first legal charge over his land held in favour of the respondent. The appellant defaulted in payment of its loan in 1986. The respondent then foreclosed the land by way of a public auction on 16 March 1992. The land was sold for RM80,100 leaving a balance of RM336,012.52 still due and owing from the appellant to the respondent. Pursuant to cl 7 of the Annexure to the charge, the appellant, as chargor, had agreed that he shall pay to the respondent the difference between the amount due and the amount realised from the sale and, until such payment, will also pay interest on the balance due at the prescribed rate with monthly rests. Relying on cl 7 of the Annexure to the charge, the respondent had through their solicitors demanded for the principal sum and interest remaining due from the appellant by letters dated 18 August 1994 and 11 November 1994. The appellant failed to make payments of the amount demanded thus resulting in the commencement of a suit vide by the respondent on 17 January 1995. The respondent's claim was dismissed by the learned judicial commissioner. The respondent's appeal to the Court of Appeal was allowed. Dissatisfied with the decision of the Court of Appeal, the appellant posed inter alia the following questions for the determination of this court:

(1) Whether a claim for balance after sale is a claim founded on contract and therefore subject to the limitation period of 6 years under s 6(1)(a) of the Limitation Act 1957 ('the Act') or a claim for money secured by charge on land and thereafter subject to the limitation period of 12 years under s 21(1) of the Act?

(2) If a claim for balance after sale is a contractual claim and therefore subject to the limitation period of six years under s 6(1)(a) of the Act, when does the cause of action accrue and the limitation period begin?

Several issues on the application of s 21(5) were also posed.

It was the appellant's contention: (1) that the respondent's claim for the balance after sale was a claim founded on contract and therefore subject to the limitation period

of 6 years under s 6(1)(a) of the Act, and (2) that the limitation period began to run when a demand is made by the respondent on the appellant not as chargor but as a debtor for the payment of the difference between the amount due under the housing loan and the amount realised from the sale of the land.

Held, dismissing the appeal with costs:

(1) Section 6 cannot apply in this case in view of the express exclusion of 'any action to recover money secured by any mortgage of or charge on land' in s 6(5)(b) (see para 13). The applicable provision was s 21. Section 21(1) specifically refers to an action to recover moneys secured by a charge which is an action in personam, whilst s 21(2) specifically refers to a foreclosure action in respect of mortgaged personal property which is an action in rem. The limitation period is therefore 12 years from the date when the right to receive the money accrued or 12 years from the date on which the right to foreclose accrued respectively (see para 14).

(2) The point in time where all the material facts were said to be in existence to render the cause of action complete would be after the sale had been conducted and the differential amount remaining due to the respondent had been ascertained (see para 24). Therefore, the earliest possible date the respondent could bring an action against the appellant for breach of his personal covenant under cl 7 is on 16 March 1992, being the date the property was sold by auction (see para 25).

(3) Since the respondent's cause of action arose on 16 March 1992, their action against the appellant which was filed on 17 January 1995 was filed well within the time prescribed in s 21(1) of the Act, ie 12 years (see para 26). This would therefore mean that the cause of action against the appellant as chargor as regards his personal liability in the present appeal will only accrue after the differential amount has been ascertained, ie after the land has been sold (see para 32).

(4) In short, the contractual provisions of the Annexure to the charge provides for two separate causes of action. The first is statutory in nature, ie the foreclosure action under the National Land Code 1965 (action in rem). The second which arises only after the foreclosure action (and if there is still a surplus owing) is the action in personam against the chargor (see para 33). Indeed, if a suit is brought against the chargor before the completion of the foreclosure action and the determination that there is a balance still owing, such a suit could be struck-off as being premature (see para 35).

(5) The first notice of demand was issued by the respondent's solicitors on 18 August 1994 and subsequently, the respondent's solicitors issued another notice of demand against the appellant. Therefore, the limitation period only began to run from the expiry of the time specified for payment in the letter of 18 August, ie on 26 August 1994. The respondent's action, therefore, was filed well within the limitation period allowed under s 21(1) of the Act (see para 38).

(6) If, as suggested by the appellant, time begins to run from the time the appellant first defaulted, ie 25 September 1986 (seven days after the first demand was made), this would mean that the respondent should have proceeded by way of a civil suit (when the appellant defaulted in repayment of his housing loan) concurrently with realizing the security under the charge in order to avoid the danger of being caught by limitation, instead of realizing the security under the charge first and, upon the sale being concluded, to institute a separate action to recover the insufficient amount from the chargor personally as being done here. As was the case here, the respondent was not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge. The proper mode of recovery is to proceed by way of foreclosure and if there arises any difference to the amount due after deducting the amount realised from the sale, a separate action should be taken against the chargor on his personal liability to recover the balance (see paras 40–41).

(7) The issues on s 21(5) did not come within the ambit of s 96(a) of the Courts of Judicature Act 1964 and the court would refrain from answering them. The Court of Appeal was correct when it refrained from deciding on the effect of s 21(5) of the Act since it was not pleaded nor was any evidence presented to substantiate it nor was any arguments made by the appellant on it in the High Court or Court of Appeal (see paras 50–51).

[Bahasa Malaysia summary

Melalui sandaran, perayu, telah pada tahun 1984 membentuk satu gadaian pertama yang sah ke atas tanah beliau yang dipegang bagi pihak responden. Perayu telah gagal membuat bayaran pinjamannya pada tahun 1986. Responden kemudian telah menghalang tebus tanah tersebut melalui satu lelongan awam pada 16 Mac 1992. Tanah tersebut dijual sejumlah RM80,100 meninggalkan baki RM336,012.52 masih perlu dibayar dan terhutang daripada perayu kepada responden. Menurut fasal 7 Lampiran kepada gadaian itu, perayu, sebagai pemegang gadaian, telah bersetuju bahawa beliau akan membayar kepada responden perbezaan antara jumlah yang perlu dibayar dan jumlah yang direalisasikan daripada julan itu dan, sehingga bayaran itu dibuat, akan juga membayar faedah atas baki yang perlu dibayar pada kadar yang ditetapkan setiap bulan. Bergantung kepada fasal 7 kepada Lampiran dalam gadaian itu, responden telah melalui peguamnya menuntut jumlah prinsipal dan faedah yang masih perlu dibayar daripada perayu melalui surat-surat bertarikh 18 Ogos 1994 dan 11 November 1994. Perayu telah gagal membuat bayaran untuk jumlah yang dituntut dan oleh itu guaman dimulakan oleh responden pada 17 Januari 1995. Tuntutan responden telah ditolak oleh pesuruhjaya kehakiman yang bijaksana. Rayun responden ke Mahkamah Rayuan telah dibenarkan. Berasa tidak pusa hati dengan keputusan Mahkamah Rayuan, perayu mengutarakan, antara lain, persoalan-persoalan berikut untuk ditentukan oleh mahkamah ini:

(1) Sama ada tuntutan untuk baki selepas jualan adalah tuntutan yang berdasarkan kontrak dan oleh itu tertakluk kepada tempoh had masa enam tahun di bawah s 6(1)(a) Akta Had Masa 1957 ('Akta tersebut') atau tunttuan untuk wang

yang disandarkan oleh gadaian ke atas tanah dan oleh itu tertakluk kepada tempoh had mas 12 tahun di bawah s 21(1) Akta tersebut? A

(2) Jika tuntutan untuk baki selepas jualan merupakan tuntutan kontraktual dan oleh itu tertakluk kepada tempoh had masa enam tahun di bahawa s 6(1)(a) Akta tersebut, bilakah kausa tindakan terakru dan tempoh had masa bermula?

Beberapa persoalan tentang pemakain s 21(5) juga dikemukakan. B

Adalah hujah perayu: (1) bahawa tuntutan responden untuk baki selepas jualan adalah tuntutan berasaskan kontrak dan oleh itu tertakluk kepada tempoh had masa enam tahun di bawah s 6(1)(a) Akta tersebut, dan (2) bahawa tempoh had masa bermula apabila tuntutan dibuat oleh responden terhadap perayu bukan sebagai pemegang gadaian tetapi sebagai penghutang untuk bayaran perbezaan antara jumlah yang perlu dibayar di bawah pinjaman perumahan dan jumlah yang direalisasikan daripada jualan tanah itu. C

Diputuskan, menolak rayuan dengan kos: D

(1) Seksyen 6 tidak boleh terpakai dalam kes ini berdasarkan pengecualian nyata 'any action to recover money secured by any mortgage of or charge on land' dalam s 6(5)(b) (lihat perenggan 13). Peruntukan yang terpakai adalah s 21. Seksyen 21(1) khususnya merujuk kepada satu tindakan untuk mendapat balik wang yang disandarkan oleh satu gadaian iaitu satu tindakan in personam, manakala s 21(2) khususnya merujuk kepada tindakan halang tebus berhubung harta cagaran peribadi iaitu satu tindakan in rem. Tempoh had masa adalah 12 tahun daripada tarikh apabila hak untuk menerima wang itu terakru daripada tarikh di mana hak untuk halang tebus terakru masing-masingnya (lihat perenggan 14). E F

(2) Saat di man semua fakta-fakta material dikatakan wujud sehingga menyebabkan kausa tindakan sempurna adalah selepas jualan dikendalikan dan perbezaan jumlah yang masih perlu dibayar kepada responden telahpun ditentukan (lihat perenggan 24). Oleh itu, tarikh paling awal untuk membolehkan responden memulakan tindakan terhadap perayu kerana melanggar waad peribadi beliau di bawah fasal 7 adalah pada 16 Mac 1992, yang merupakan tarikh harta itu dijual melalui lelongan (lihat perenggan 25). G

(3) Memandangkan kausa tindakan responden timbul pada 16 Mac 1992, tindakan mereka terhadap perayu yang difailkan pada 17 Januari 1995 telah difailkan dalam masa yang ditetapkan dalam s 21(1) Akta tersebut, iaitu 12 tahun (lihat perenggan 26). Ini bermakna bahawa kausa tindakan terhadap perayu sebagai pemegang gadaian berkaitan liabiliti peribadinya dalam rayuan semasa akan hanya terakru selepas perbezaan jumlah itu ditentukan, iaitu selepas tanah dijual (lihat perenggan 32). H

(4) Pendek kata, peruntukan kontraktua; Lampiran kepada gadaian itu memperuntukkan untuk dua kausa tindakan yang berasingan. Yang pertama bersifat statutori, iaitu tindakan halang tebus di bawah Kanun Tanah Negara 1965 (tindakan in rem). Keduanya hanya timbul selepas tindakan halang tebus (dan jika masih ada baki yang tertunggak) adalah tindakan in personam terhadap pemegang gadaian (lihat perenggan 33). Sememangnya, jika guaman I

dimulakan terhadap pemegang gadaian sebelum tindakan halang tebus selesai dan penentuan bahawa terdapat baki masih tertunggak, guaman itu boleh dibatalkan kerana pra masa (lihat perenggan 35).

(5) Notis tuntutan pertama dikeluarkan oleh peguam responden pada 18 Ogos 1994 dan berikutan itu, peguam responden telah mengeluarkan notis tuntuan lain terhadap perayu. Oleh itu, tempoh had masa hanya bermula daripada tamatnya masa yang ditetapkan untuk bayaean dalam surat 18 Ogos, iaitu 26 Ogos 1994. Tindakan responden, oleh itu, telah difailkan dalam tempoh had masa yang dibenarkan di bawah s 21(1) Akta tersebut (lihat perenggan 38).

(6) Jika, seperti dicadangkan oleh perayu, masa bermula daripada masa perayu gagal kali pertama, iaitu 25 September 1986 (tujuh hari selepas tuntutan pertama dibuat), ini bermakna responden patut memulakan guaman sivil (apabila perayu gagal membayar balik pinjaman perumahan beliau) serantak dengan sandaran di bawah gadaian bagi tujuan mengelakkan bahaya terperangkap oleh had masa, dan bukan merealisasikan sandaran itu di bawah gadaian pertama dan setelah julan selesai, memulakan tindakan berasingan untuk mendapat balik jumlah yang tidak mencukupi daripada pemegang gadaian secara peribadi seperti yang dilakukan di sini. Sebagaimana kes ini, responden tidak berhak dari segi undang-undang dan ekuiti untuk memulakan melalui guaman sivil sebelum merealisasi sandaran di bawah gadain itu. Cara betul untuk mendapat balik wang adalah melalui halang tebus dan jika timbul apa-apa perbezaan terhadap jumlah yang perlu dibayar selepas menolak jumlah yang direalisasikan daripada jualan, satu tindakan berasingan patut diambil terhadap pemegang gadaian atas liabiliti peribadinya untuk membayar balik baki itu (lihat perenggan 40–41).

(7) Persoalan tentang s 21(5) tidak terangkum dalam skop s 96(a) Akta Kehakiman Mahkamah 1964 dan mahkamah enggan menjawabnya. Mahkamah Rayuan adalah betul apabila ia tidak memutuskan kesan s 21(5) Akta tersebut memandangkan ia tidak diplidkan maupun terdapat apa-apa keterangan dikemukakan untuk memperkukuhkannya maupun terdapat apa-ap hujah dibuat oleh perayu tentangnya di Mahkamah Tinggi atau Mahkamah Rayuan (lihat perenggan 50–51).]

Notes

For a case on an action by chargee to recober shortfall from a foreclosure proceeding, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2154.

For cases on enforcement of charge, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1988–1990.

Cases referred to

Credit Corp (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409 (refd)

Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah [1991] 3 MLJ 119 (refd)

Leong Yick Realty Co Sdn Bhd v Asia Commercial Finance (M) Sdn Bhd [1994] 2 MLJ 308 (refd)

Lim Geak Liang v East West UMI Insurance Bhd [1997] 3 MLJ 517 (refd)
Lim Kean v Choo Koon [1970] 1 MLJ 158 (refd)
McHenry, Re, McDermott v Boyd (Barker's claim) (1894) 3 Ch 290 (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257 (refd)

Legislation referred to
Courts of Judicature Act 1964 s 96(a)
Limitation Act 1957 ss 6(1), (5)(b), 21(1), (2)
National Land Code 1965

Jacob Goldie (Majdah Muda with him) (Sooriyar & Co) for the appellant.
Wong Hok Mun (John Wong with him) (Azim, Tunku Farik & Wong) for the respondent.

Alauddin FCJ (delivering judgment of the court):

BACKGROUND FACTS

[1] The respondent had, on 28 March 1984 approved a housing loan application by the appellant, who is a life policyholder of the respondent, for the amount of RM142,000 with interest thereon at 12% per annum.

[2] By way of security, the appellant, had among others created a first legal charge over his land held under Title No GM 1984, Lot No 11393, Mukim of Kuantan, District of Kuantan, Pahang ('the said land') in favour of the respondent.

[3] The appellant had defaulted in the repayment of the housing loan and respondent thereafter exercised their statutory rights and foreclosed the said land by way of a public auction on 16 March 1992.

[4] The said land was sold for RM80,100 leaving a balance of RM336,012.52 still due and owing from the appellant to the respondent.

[5] Pursuant to cl 7 of the Annexure to the charge, the appellant, as chargor, had agreed that he shall pay to the respondent the difference between the amount due and the amount realised from the sale and, until such payment, will also pay interest on the balance due at the prescribed rate with monthly rests.

[6] Relying on cl 7 of the Annexure to the charge, the respondent had through their solicitors, Messrs Azim Ong & Krishnan, demanded for the principal sum and interest remaining due from the appellant by letters dated 18 August 1994 and 11 November 1994. The appellant failed to make payments of the amount demanded thus resulting in the commencement of a suit vide Kuala Lumpur High Court (Commercial Division) Suit No D5–22–40 of 1995 by the respondent on 17 January 1995.

[7] The respondent's claim was dismissed by the learned judicial commissioner, on 15 May 1996. The respondent appealed to the Court of Appeal. The appeal was allowed.

[8] Dissatisfied with the decision of the Court of Appeal, the appellant applied to this court for leave to appeal which was granted on 23 September 2003.

THE ORDER GRANTING LEAVE

[9] The order granting leave, posed the following questions for the determination of this court:

Q1: Whether a claim for balance after sale is a claim founded on contract and therefore subject to the limitation period of six years under s 6(1)(a) of the Limitation Act 1957 ('the Act') or a claim for money secured by charge on land and thereafter subject to the limitation period of 12 years under s 21(1) of the Act?

Q2: If a claim for balance after sale is a contractual claim and therefore subject to the limitation period of six years under s 6(1)(a) of the Act, when does the cause of action accrue and the limitation period begin?

Q3: If a claim for balance after sale is a claim for money secured by a charge on land and therefore subject to the limitation period of 12 years under s 21(1) of the Act:

(i) when does the cause of action accrue and the limitation period begin?

(ii) is the interest component of the claim subject to s 21(5) of the Act?

(iii) for s 21(5) of the Act, when does the cause of action for interest in arrears accrue and the six years limitation period begin?

(iv) if the claim for the balance after sale consists of mixture of both principal sum and interest and the claim for interest is barred by s 21(5) of the Act, is the claim barred altogether?

QUESTION (1):

[10] The primary issue in this appeal concerns the provisions of the Act. It is the appellant's contention that the respondent's claim for the balance after sale is a claim founded on contract and therefore subject to the limitation period of six years under s 6(1)(a) of the Act whilst the respondent contends that the claim is a claim for money secured by charge on land and therefore subject to the limitation period of 12 years under s 21(1) of the Act.

[11] Section 6 provides as follows:

6 Limitation of actions of contract and tort and certain other actions.

A

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued that is to say —

(a) (a) actions founded on contract or on tort;

B

(b) …;

(c) …;

(d) …;

(2) …; C

(3) …;

(4) …;

(5) Nothing in this section shall apply to —

(a) ; or D

(b) any action to recover money secured by any mortgage of or charge on land or personal property.

(6) …

E

[12] Section 21 provides as follows:

21 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land.

(1) No action shall be brought to recover any principal sum of money secured F by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

(2) No foreclosure action in respect of mortgaged personal property shall be G brought after the expiration of twelve years from the date on which the right to foreclose accrued:

Provided that ….

[13] Having had a close look at both sections mentioned above, we are of the view H that s 6 cannot apply in this case in view of the express exclusion of 'any action to recover money secured by any mortgage of or charge on land' in s 6(5)(b). The action is therefore not founded on a claim on contract under s 6.

[14] In our judgment, the applicable provision is s 21. Section 21(1) specifically I refers to an action to recover moneys secured by a charge which is an action in personam, whilst s 21(2) specifically refers to a foreclosure action in respect of mortgaged personal property which is an action in rem. The limitation period is therefore 12 years from the date when the right to receive the money accrued or 12 years from the date on which the right to foreclose accrued respectively.

[15] What we have said thus far would answer Question (1) posed by the appellant. Our answer to Question (1) above makes Question (2) superfluous. We would, therefore, refrain from answering it. Having said that, we shall now proceed to consider Question (3)(i) above.

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Question (3)(i)

[16] As we have mentioned earlier, the claim by the respondent against the appellant is for the difference between the amount due under the housing loan and the amount realised from the sale of the said land charged to the respondent by the appellant and interest thereon based on the respondent's contractual right pursuant to cl 7 of the Annexure to the charge signed by the appellant in his capacity as the chargor.

[17] Clause 7 of the Annexure to the charge which carries the heading 'Personal Liability of Chargor' provides as follows:

> If the amount realised by the lender on a sale of the said land under the provisions of the National Land Code 1965 after deduction and payment from the proceeds of such sale of all fees, dues, costs, rents, rates, taxes and other outgoings on the said land is less than the amount due to the lender and whether at such sale the lender is the purchaser or otherwise the chargor(s) shall pay to the Lender the difference between the amount due and the amount so realised and until such payment will also pay interest on such balance at the prescribed rate as aforesaid with monthly rests.

[18] From the reading of cl 7 above, it is obvious to us that prior to the auction, it would not be possible for the respondent to ascertain the exact amount that can be realised from the sale of the said land and whether there will still remain any excess amount due to the respondent.

[19] It follows, therefore, that the respondent can only enforce their right against the personal liability of the appellant under cl 7 when the sale has been conducted and the excess amount due, if any, has been ascertained.

[20] Only after the auction was conducted on 16 March 1992 and a sum of RM80,100 was realised from the sale did the respondent manage to ascertain that a sum of RM336,015.52 was still due and owing from the appellant to the respondent with interest still accruing thereon until full settlement.

[21] The question that comes to mind is when does the cause of action with regard to the personal liability of the chargor arise or deemed to have accrued?

[22] In determining when a cause of action is deemed to have accrued, Yong J in *Lim Kean v Choo Koon* [1970] 1 MLJ 158 had this to say:

A cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. (see *Halsbury's Laws of England* (3rd Ed) pp 193 and 194).

In *Cooke v Gill*, Brett J defined 'a cause of action' to mean 'every fact which is material to be proved to entitle the plaintiff to succeed.' This definition was approved by the Court of Appeal in *Read v Browne* in which Lord Esher MR in his grounds of judgment said that it included 'every fact which if would be necessary for plaintiff to prove, if traversed, in order to support his right to the judgment of the court.'

After reviewing these and other authorities including *Barton v North Staffordshire Rly Co* and *Welch v Bank of England*, I have come to the conclusion that the period of limitation does not begin to run until there is a complete cause of action, and a cause of action is not complete when all the facts have not happened which are material to be proved to entitle the plaintiff to succeed.

[23] The Supreme Court in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 referred to *Lim Kean v Choo Koon* and the authorities cited therein and held that it is established that the cause of action normally accrues where there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

[24] In the circumstances of the present appeal before us, we are of the view that the point in time where all the material facts are said to be in existence to render the cause of action complete would be after the sale has been conducted and the differential amount remaining due to the respondent has been ascertained.

[25] Therefore, the earliest possible date the respondent could bring an action against the appellant for breach of his personal covenant under cl 7 is on 16 March 1992, being the date the property was sold by auction.

[26] Since the respondent's cause of action arose on 16 March 1992, their action against the appellant which was filed on 17 January 1995, was filed well within the time prescribed in s 21(1) of the Act, ie 12 years.

[27] In the course of his submissions, learned counsel for the respondent drew our attention to the case of *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah* [1991] 3 MLJ 119 (*HSBC*'s case). We find that the facts in that case are somewhat similar to the facts of the case under appeal.

[28] In that case, the plaintiff bank had granted a housing loan to the defendant on the security of the letter's land which was charged to the plaintiff bank. The outstanding amount due as at 9 May 1986 to the plaintiff on the said facility for which a claim was being made was $290,873.56. To realize the money owing, the plaintiff applied for an order for sale of the said land and the Kuantan Land Office had granted the application but had yet to fix the date of auction. The plaintiff also filed a writ of summons in the Kuantan High Court claiming the amount due.

[29] Subsequently, there was an application by the plaintiff bank for the decision of the High Court, Kuantan on the following questions: 'whether the plaintiff being also the chargee of property comprised under HS(M) 13399 Lot 3134/29 in the Mukim of Kuala Kuantan ('the said land') was entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge and if so, whether the plaintiff was entitled to proceed concurrently on all its remedies?'

[30] The learned High Court judge, Lamin J (as he then was) answered the question in the negative and held that if the amount realized by the chargee on the sale of the charged land was less than the amount due to the chargee, the chargor shall pay to the chargee the difference between the amount due and the amount so realized. So the personal liability of the chargor was only to the extent of the balance of the amount due (cl 8). Upon reading the charge annexure as a whole, both the chargee and chargor were bound by the terms and conditions of the charge and to realize that amount owing, the land must be sold in accordance with the provisions of the National Land Code 1965. If the amount realized from the sale was not sufficient to cover the amount due then it was implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the difference. The plaintiffs appeal to the Supreme Court vide Civil Appeal No 02–65 of 1991 was heard on 10 June 1991 and 11 June 1991 and the court dismissed the appeal with costs (see Editorial Note to the case).

[31] Clause 7 of the Annexure to the charge in the present appeal as quoted earlier is in pari materia with cl 8 of the Annexure to the charge in HSBC's case above.

[32] This would therefore mean that the cause of action against the appellant as chargor as regards his personal liability in the present appeal will only accrue after the differential amount has been ascertained, ie after the land has been sold.

[33] In short, the contractual provisions of the Annexure to the charge provides for two separate causes of action. The first is statutory in nature, ie the foreclosure action under the National Land Code 1965 (action in rem). The second which arises only after the foreclosure action (and if there is still a surplus owing) is the action in personam against the chargor.

[34] The decision of Lamin J (as he than was) in *HSBC*'s case was also followed by Haidar J (as he then was) in *Leong Yick Realty Co Sdn Bhd v Asia Commercial Finance (M) Sdn Bhd* [1994] 2 MLJ 308 where his Lordship held (at p 313):

> In any event, as the debt is disputed by the plaintiff, the defendant should proceed by way of a separate action against the plaintiff to recover for the shortfall. In fact, the case of the *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah*, relied on by counsel for the defendant, would seem to support that a separate action need to be taken against the plaintiff to recover the shortfall.

[35] At the risk of repetition, we would reiterate that the personal liability of the appellant as chargor is in respect of the difference between the amount due under the housing loan and the amount realised from the sale of the said land only and the

cause of action against the appellant is only complete upon the conclusion of the sale of the said land. Indeed, if a suit is brought against the chargor before the completion of the foreclosure action and the determination that there is a balance still owing, such a suit could be struck off as being premature.

[36] That brings us to the next question, ie when does the period of limitation commence?

[37] It is the appellant's contention that the limitation period begins to run when a demand is made by the respondent on the appellant not as chargor but as a debtor for the payment of the difference between the amount due under the housing loan and the amount realised from the sale of the said land.

[38] The first notice of demand was issued by the respondent's solicitors on 18 August 1994 by registered post directed to the appellant's address as appearing in the Annexure to the charge. Subsequently, the respondent's solicitors issued another notice of demand by registered post addressed to the appellant at his residence. In our considered opinion, the limitation period only begins to run from the expiry of the time specified for payment in the letter of 18 August 1994, ie on 26 August 1994. The respondent's action, therefore, was filed well within the limitation period allowed under s 21(1) of the Act.

[39] The appellant, on the other hand, relying on s 6(1)(a) of the Act, contends that there is only one cause of action, ie an action founded on contract. The moment the appellant fails to pay the first instalment due (ie on 25 September 1986), the whole sum becomes immediately due and payable and that is the instant from when time begins to run. Since the appellant's action was filed on 17 January 1995, ie 8 years 3 months and 23 days after the date on which the cause of action accrued, it becomes statute-barred.

[40] To our minds, the appellant's contention, if allowed to succeed, would result in a perverse outcome. If, as suggested by the appellant, time begins to run from the time the appellant first defaulted, ie 25 September 1986 (seven days after the first demand was made), this would mean that the respondent should have proceeded by way of a civil suit (when the appellant defaulted in repayment of his housing loan) concurrently with realizing the security under the charge in order to avoid the danger of being caught by limitation, instead of realizing the security under the charge first and, upon the sale being concluded, to institute a separate action to recover the insufficient amount from the chargor personally as being done here. This, if implemented, it would run counter to the decision in *HSBC*'s case which in our judgment is the correct decision.

[41] As is the case here, where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the Annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge. The proper mode of recovery is to proceed by way of foreclosure and if there arises any difference to the amount

due after deducting the amount realised from the sale, a separate action should be taken against the chargor on his personal liability to recover the balance.

[42] The facts in the present appeal are different and can be distinguished from the facts in *Re McHenry, McDermott v Boyd (Barkers claim)* (1894) 3 Ch 290 (CA) relied upon by counsel for the appellant.

[43] In the present appeal, the only form of agreement or covenant agreed to by both the respondent (chargee) and the appellant (chargor) is the Annexure to the charge which stipulates the terms and conditions of the charge. To realize the amount owing, the land must be sold in accordance with the provisions of the National Land Code 1965. As we have said earlier, the personal liability of the chargor is only for the difference between the amount due and the amount realized from the sale of the said land.

[44] In *McHenry*'s case, there is no requirement that in order for the plaintiff to realize the amount owing, he must first sell the bonds deposited by the defendant. In that case Lindley LJ was right when he said:

> It means that, if the amount is not paid when it becomes payable, Barker may realize the securities, giving Mc Henry credit for the amount of the proceeds. The promise to pay the deficiency does not create a new obligation to pay: it only applies the old obligation to a reduced sum. The realization of the security does not add to the cause of action; the cause of action accrued long before.

[45] Unlike the facts of the present appeal where the right of the respondent chargee and the mode of realizing the amount due has been prescribed in the Annexure to the charge, the plaintiff in *McHenry*'s case was free to recover the amount due upon default by way of a civil suit whether solely or concurrently and the sale of the security was just to reduce the amount owing.

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Questions (3)(ii), (iii) and (iv)

[46] All these questions refer to s 21(5) of the Act. In the course of his submissions, learned counsel for the respondent urged upon us to refrain from answering these questions on the ground that they did not come within the ambit of s 96(a) of the Courts of Judicature Act 1964. He submitted that, in the first place, leave should not have been granted in respect of these questions. In support, he cited the Federal Court case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257.

[47] The issue which arose in *Sri Kelangkota* was whether leave ought to have been granted in the first place based on the circumstances in that case and whether the judgment must be based on issues raised in the application for leave.

[48] The court there held that, whether leave should have been given or not, it had been dealt on the merits by the High Court and the Court of Appeal. It was not

simply a matter of lack of jurisdiction. Further, no preliminary objection had been raised at the appeal stage against the granting of the leave. In the light of the authorities, the court was not prevented from reconsidering the issue of leave.

[49] Delivering the judgment of the court, Abdul Malek Ahmad FCJ (as he then was) had this to say (at p 358)

> Despite that, in the light of the authorities, we would hold that we are not prevented from reconsidering the issue of leave again. Coming back to the questions formulated for determination by this court, it is our view that the questions do not involve a question of importance upon which further argument and a decision of this court would be to public advantage. The questions merely relate to the set of facts in the appeal and the application of the settled principles of law as is plain from the judgment of the Court of Appeal. As such, they do not come within the ambit of s 96(a) of the CJA and, therefore, there is no necessity or purpose for this court to answer the questions posed regardless of the fact that leave to appeal has in fact been granted at an earlier hearing.

[50] For the same reasons, we would agree with the submission of learned counsel for the respondent that these questions do not come within the ambit of s 96(a) of the CJA and we would refrain from answering them.

[51] There is one other reason why we feel this issue concerning s 21(5) of the Act ought not to be considered in this appeal. A perusal of the notes of evidence shows that, in fact, the appellant was all along relying on s 6 of the Act as a complete defence to defeat the whole claim. The amount claimed was not disputed. Since this is an issue of law dependent upon a finding of facts, the Court of Appeal was correct when it refrained from deciding on the effect of s 21(5) of the Act in this case since it was not pleaded nor was any evidence presented to substantiate it nor was any arguments made by the appellant on it in the High Court or Court of Appeal.

[52] The same issue was addressed by this court in *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517.

[53] In that case, the plaintiff took a policy of insurance ('the policy') from the defendant. During the currency of the policy, he accidentally chopped off his left thumb. The plaintiff later gave notice of the accident and submitted his claim for compensation for permanent disablement which the defendant refused on the grounds, inter alia, that he was in breach of condition 4 of the policy when he failed to inform the defendant that during the currency of the policy, another policy had been issued to him by another insurance company. The plaintiff had become a member of a discount card scheme and had been insured under the group personal policies.

[54] In the sessions court, the plaintiff contended that he was not required under condition 4 to disclose any other insurance effected against accident where such insurance was effected after or during the policy with the defendant. The sessions court judge rejected the plaintiffs claim and the High Court affirmed the decision. The plaintiff appealed to the Federal Court on the ground that by virtue of the words

'excluding coupon1 appearing in condition 4, the High Court judge had erred in finding that the plaintiff should have notified the defendant of the insurance coverage under the group personal policies. Counsel for the defendant objected to this new issue which was never pleaded and argued in the courts below.

[55] This court held that whether or not the plaintiff's second policy came under the exclusion clause must necessarily depend on the facts. The evidential burden was on the plaintiff to bring himself within the exception. This can only be resolved by the court below after hearing the evidence adduced by the plaintiff.

[56] Mohamed Dzaiddin FCJ (as he then was) in delivering the judgment of the court had this to say (at p 523):

> In *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9 at p 16, the Federal Court adopted the observations of Reay J and Lord Finlay LC in *A-G v Pang Ah Yew* [1934] MLJ 184 at p 187 and *Banbury v Bank of Montreal* [1918] AC 626 respectively, that on general principles, where a decision on a question of law is dependant upon a finding of fact which was not made by a judge or jury because the question was not raised or put at the trial or where the question of law cannot be resolved without further evidence not available on the record, a court of appeal would not interfere with the judgment or verdict of the lower court.

[57] From the notes of proceedings in the courts below, we are satisfied that the issue of s 21(5) of the Act was never raised by the appellant's former counsel. In fact, the argument of the appellant's counsel before the learned High Court judge merely centred around s 6 of the Act in order to defeat the whole claim. Nowhere was the issue of s 21(5) of the Act addressed or argued before the judges below, because otherwise, something would have been said in their respective judgments.

[58] For the reasons we have stated above, we decline to answer Questions 3(ii), (iii) and (iv) above.

[59] Even assuming that we have to answer these questions, our answer would be that s 21(5) of the Act would apply since the Respondent's action is governed by s 21 thereof.

[60] However, the respondent's right of action to recover interest is not time-barred since their right to bring the action to recover the shortfall sum and interest thereon crystallised on 16 March 1992. The action for recovery of interest was therefore filed within six years, well within the period prescribed by s 21(5) of the Act.

CONCLUSION

[61] For the reasons advanced, we are unanimous that this appeal should be dismissed with costs. The deposit is to be paid out to the respondent to account of their taxed costs.

[62] My learned brother Abdul Malek Ahmad PCA and my learned sister Siti Norma Yaakob FCJ have seen this judgment in draft and expressed their agreement with it.

Appeal dismissed with costs.

Reported by Loo Lai Mee